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IN THE

# Supreme Court of the United States

**October Term, 1966**

No. 562

The Board of Supervisors of Prince Edward County, Virginia, and its constituent members, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right,

*Petitioners,*

v.

Cocheyse J. Griffin, Migon D. Griffin, Naja D. Griffin and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, their father and next friend, and all other of the plaintiffs,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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*To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The Board of Supervisors of Prince Edward County, Virginia and its constituent members, namely, W. W.

Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right, petitioners herein, pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled cause on the 20th day of June, 1966.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported and along with the dissenting opinion is printed in Appendix A hereto pages 1 through 11.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on the 20th day of June, 1966, *infra,* Appendix, page 18. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). Order staying the execution of a portion of the Order entered on June 20, 1966, until application to this Court for a writ of certiorari was issued on July 29, 1966, *infra,* Appendix, page 19.

## QUESTIONS PRESENTED

### I

Does 18 U.S.C. § 401 (3) deny jurisdiction to a Court of Appeals to find an appellee guilty of contempt for doing an act not forbidden by a "lawful writ, process, order, rule, decree, or command" of said Court where the appellant had given notice of appeal of a judgment of the district court refusing to enjoin the act done by the appellee but made no application for an Order preserving the status quo pending decision on appeal as provided by Federal Rules of Civil Procedure 62 (c), (g).

## STATUTES INVOLVED

18 U.S.C. § 401. Power of Court

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

Federal Rules of Civil Procedure 62 (c), (g)

* * *

(c) "Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

* * *

(g) "Power of Appellate Court not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to

suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

**STATEMENT**

The history of this litigation is set forth in the opinion of this Court. *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 12 L ed 2nd 256, 84 Supreme Court 1226. The Court held that abstention was not appropriate under the facts of the case and reversed the United States Court of Appeals and affirmed the judgment of the United States District Court for the eastern district of Virginia which Court had previously held that tuition grants payable to parents under circumstances existing in Prince Edward County should be enjoined "so long as the public schools of the County remained closed." That the District Court could require the Board of Supervisors to levy the necessary taxes and appropriate the necessary money to give the children of Prince Edward County "the kind of education that is given in the State's public schools. (Appendix, page 20. Mandate of the Supreme Court of the United States dated May 25, 1964.)

On June 5, 1964 the District Court entered an Order requiring the School Board and the Board of Supervisors of Prince Edward County to report the plans made for reopening schools and whether necessary funds had been appropriated. The School Board reported its plans for opening schools. The Board of Supervisors advised the Court that necessary funds had not been appropriated and would not be appropriated prior to June 17, 1964.

On June 17, 1964 the District Court entered its Order directing the members of the Board of Supervisors on or before June 25, 1965 to "appropriate such County funds as are reasonably necessary for the opening and mainte-

nance of the public schools of Prince Edward County "on a non-discriminatory basis beginning with the Fall Term, 1964; and if necessary to so do, the said members of the Board of Supervisors acting as such, are directed to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination the public school system in Prince Edward County like that operated in other counties in Virginia." The Court continued the injunction previously entered restraining the payment of tuition grants to residents of Prince Edward County "so long as the public schools of the County remained closed." (Appendix page 21, *et sec.*)

On June 29, 1964 the plaintiffs filed a motion to amend the Order of June 17, 1964 in the following particulars:

1. To restrain the payment of tuition grants "for use in any school that discriminates in the admission and education of pupils on the basis of race and from paying or causing the payment of such scholarships to any such person for use at any such school."

2. To enjoin the School Board and Superintendent of Schools "from assigning teachers or other administrative personnel on the basis of race and color."

3. Requiring the Board of Supervisors of Prince Edward County "to appropriate such County funds as are reasonably necessary for the opening and maintaining of the public schools of Prince Edward County and for all of the children of said county of public school age on a racially non-discriminatory basis." (Appendix, page 25.)

On July 7, the plaintiffs filed a motion in the District Court for further relief praying for an injunction substantially in accord with its previous motion to alter and amend the judgment order of June 17. (Appendix page 25)

The Board of Supervisors of Prince Edward County filed written response to the motion to alter and amend the judgment order of June 17. (Appendix, page 26) The Board also reported its action in response to Order entered on June 17, 1964 in which it reported that it had levied taxes and appropriated funds which it deemed adequate for the operation of public schools in Prince Edward County on a racially non-discriminatory basis during the year 1964-65, a total sum of $418,200.00 being thus made available for the said school year. The report shows the appropriation to be in excess of the appropriation of any of seven counties of Virginia adjoining Prince Edward County on the basis of the amount per pupil in average daily attendance for the latest figures available.

The District Court heard these motions on July 9 and on that date denied the same for reasons stated in its Order. (Appendix, page 31) The plaintiffs filed notice of appeal on July 17, 1964 and subsequently on July 28 moved the Court to accelerate the appeal. (Appendix pages 33, 35)

The Chief Judge of the Court of Appeals through the Clerk of that court by contact with the office of the Attorney General of Virginia sought to obtain a stipulation that no tuition grants would be paid pending the appeal. This was done on August 4 and on the same date the Clerk of the Court of Appeals was advised that the Board of Supervisors would not make the stipulation. On August 5, 1964 the Board adopted a resolution authorizing the payment of tuition grants in the amount of $310.00 for children attending a private non-sectarian high school and in the amount of $290.00 for children attending a private non-sectarian elementary school, one-half to be paid on or before September 1, 1964, and one-half on or before January 1, 1965. During the night applications for these funds were

prepared and on the morning of August 5 checks were issued to parents applying therefor. On August 13, 1964 the appellants moved the Court of Appeals to cite the Board of Supervisors of Prince Edward County for contempt for its action in thus paying tuition grants under its local ordinance and under the state law. The Board of Supervisors of Prince Edward County responded to this motion in writing. (Appendix, page 42)

The case was combined with a similar case from Surry County, Virginia. (339 F 2nd 486) The Court remanded the case to the District Court with direction to enjoin the payment of tuition grants to parents sending their children to private segregated schools. The Court did not pass upon the contempt citation but directed the District Court to make inquiry into the facts surrounding the payments and to consider whether or not the action of the Board was a contempt of an Order entered by the District Court on July 9 by agreement of the parties permanently enjoining the payment of tuition grants for the school year 1963-64. The District Court after hearing the testimony of all witnesses offered made its finding of fact in Order entered May 17, 1965. (Appendix, page 45) Upon these facts in a 3 to 2 decision the Court of Appeals held that because the purpose of this action was to avoid the effect of a possible adverse decision this constituted the "resistance to its (this court's) lawful writ, process, order, rule, decree, or command." We do not believe the law supports the decision of the Court.

## REASONS FOR GRANTING THIS WRIT

While there may be doubt that 18 U.S.C. § 401 restricts the power of the Supreme Court because that Court is created by the constitution itself, it is well established that this statute does limit the power of District Courts and of

Courts of Appeal to punish for contempt. These Courts are created by the powers vested in the Congress under the constitution and there can be no doubt that the Congress has the lawful power and authority to limit their jurisdiction.

*Ex parte Robinson,* 19 Wall (U.S.) 505, 22 L ed 205; *Nye* v. *U.S.,* 313 U.S. 33, 85 L ed 1172; *In The Matter of Michael,* 326 U.S. 224, 90 L ed 30; *RE McConnell,* 370 U.S. 230, 8 L ed 2d 434; *Green* v. *U.S.,* 356 U.S. 165, 2 L ed 2d 672.

**ANALYSIS OF THE STATUTE**

The former statute 28 U.S.C. § 385 was in the following language:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, *That such power to punish contempts shall not be construed to extend to any cases except* the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." (Emphasis added)

The present statute 18 U.S.C. § 401 provides a Court of the United States shall have "power to punish by fine or imprisonment, at its discretion, such contempt of its authority, *and none other,* as—"

* * *

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." (Emphasis added)

This section was enacted in 1948. The words limiting the power of the court in the former statute "such power to punish contempts shall not be construed to extend to any cases except * * *" would seem to have been clear enough, however, the language used in the 1948 statute is so direct, emphatic, and simple that it cannot possibly be misconstrued. Under it the Court shall have the power to punish such contempts of its authority as are defined in the three enumerated sub-divisions and *"none other."*

It is a fundamental rule of statutory construction that every clause, phrase and word of the statute must be considered of significance and that in arriving at the meaning of the statute the Court must give force and effect to every word and phrase used therein. It must be presumed that words and phrases used in a statute were intended to be used by the legislature and that the legislative body understood their meaning and used them in their ordinary and common meaning.

See 50 Am Jur Statute § 358, pp. 362, 363, 364.

See also 82 C.J.S. Statutes § 316 b, pp. 549 *et sequa.*

Applying these principles it must be presumed that the Congress used the words and *"none other"* in their usual and common meaning and by this simple, direct, and conclusive language intended to limit the power of the Federal Court to punish for contempt to the three classes of action defined under (1), (2), and (3), of § 401.

This court and the lower Federal Courts have consistently construed this statute as a strict limitation upon the power of the lower Federal Court to punishment for contempt. Most of the cases have dealt with a construction of

28 U.S.C. § 401 (1) in seeking to ascertain and define misbehavior of any person "in the presence" of the Court "or so near thereto as to obstruct the administration of justice."

*Nye* v. *U.S.* *supra. RE McConnell supra; Farese* v. *U.S.*, 209 F 2nd, 312.

These cases clearly show the strict construction of this statute which has been sanctioned by the decisions of this Court.

Other cases demonstrating the restraint with which this Court has sought to temper the exercise of the discretionary power to punish for contempt is demonstrated by such cases as *Cook* v. *U.S.*, 267 U.S. 517, 537, 69 L ed 767, 774 holding that the defendant is entitled to compulsory process and the assistance of counsel. *Gompers* v. *U.S.*, 233 U.S. 604, 611, 612, 58 L ed 1115, 1120 holding that the defendant is entitled to the benefit of the general statute of limitations governing crimes. See also *Morgan* v. *U.S.*, 95 Fed. 2nd 830.

## THE NECESSITY THAT AN ORDER OF THE COURT BE IN EXISTENCE

The words used in the statute "disobedience or resistance to its lawful writ, process, order, rule, decree, or command" are words descriptive of a command, a direction or requirement of the Court and this command, direction or requirement of the court must be "lawful."

If there could be any possible ambiguity or uncertainty as to the meaning of the words used in § 401 (3) such ambiguity is certainly removed by the provisions of the immediately following section of the Code, 18 U.S.C. § 402 which provides:

"Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District Court of Columbia, by doing any act or thing *therein, or thereby forbidden,* if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any state in which the act was committeed, shall be prosecuted for such contempt as provided in § 3691 of this title and shall be punished by fine or imprisonment, or both."

* * *

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command *entered* in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." (Emphasis added)

The language is further enlightened and clarified by the provision of 18 U.S.C. § 3691 which provides:

"Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States *by doing or omitting* any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any act of Congress or under the law of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by jury which shall conform so near as may be to the practice in other criminal cases."

> "This section shall not apply to contempts committed in the presence of the Court or so near thereto as to obstruct the administration of justice, not to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command *entered* in any suit, or action brought or prosecuted in the name of, or on behalf of the United States."

The trial court stated in its opinion "Obviously the aim was to thwart the impact of an adverse decree forthcoming on the appeal. In effect it was a resistance to its (this court's) lawful writ, process, order, rule, decree, or command. 18 U.S.C. § 401 (3)" (Appendix, page 6)

Thus the Court of Appeals recognizes and admits that no order was in effect or had been entered or issued which forbade the action of the Board of Supervisors, but nonetheless the Court held that because it might in the ultimate determination of the pending appeal enter an order forbidding the act which was done was sufficient to bring the act within the terms of § 401 (3). This cannot be true when we look at the language of § 402 and § 3691 for those sections define the disobedience and resistance mentioned in § 401 (3) as the doing of an act or thing thereby forbidden—that is forbidden (past tense) by the lawful writ, process, rule, decree, or command. Such language does not permit punishment for contempt for the doing of an act which may at some future time prospectively be "forbidden by the lawful writ, process, order, rule, decree, or command" of the Court.

The same is true of § 3691. The language of the last paragraph of § 3691 refers to "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command *entered* (past tense) in any suit or action brought or prosecuted in the name of, or on behalf of the United States." All of these statutes should be read to-

gether, the words used therein should be given their usual purport and meaning. Given such meaning they foreclose the possibility of a person being in contempt of an order which has not been entered nor indeed which the Court has even decided should be entered.

We also need to consider in connection with a proper construction of these statutes the Federal Rules of Civil Procedure. Rule 1 provides that the Federal Rules of Civil Procedure "govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity." Rule 62 (c) expressly directs the procedure to be followed in order to preserve the rights and equities of all parties pending a decision on appeal. If this rule governs procedure in this case then punishment for contempt for destroying the so called subject matter of the litigation is neither necessary nor permissible. For if Rule 62 (c) "govern the procedure" then contempt proceedings are not permissible until the court has entered such order as in its discretion is necessary and until such order has been violated. These rules were adopted by order of the Supreme Court entered on December 20, 1937. These rules have the effect of law and supersede inconsistent statutes. Barron and Holtzoff, Federal Practice and Procedure, Volume I § 136, p. 233. It appears that Rule 62 (c) supersedes those cases supporting the view that a court may find a judgment of contempt for destroying the subject matter where no order preserving the status quo has been entered. (Such as *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527 (1911) and *Lamb* v. *Cramer* (1932) 285 U.S. 217 relied upon in the majority opinion below.)

The appellant is not entitled to an injunction or a stay as a matter of right but the matter rests in the sound discretion of the court and an injunction or stay must be sup-

ported by an appropriate showing and finding. *U.S.* v. *El-O-Pathic Pharmacy,* 192 F. 2nd 62. *Vacuum Oil Co.* v. *Grabler Mfg. Co.,* 53 F. 2nd 975. See *Sawyer* v. *U.S. Steel Co.,* 197 F. 2nd 582. Frequently the courts have refused to grant the restraining order, injunction or stay requested pending appeal. *Jemenez* v. *Barber,* 252 F. 2nd 550. *Lapin* v. *La Maurine,* 11 F.R.D. 339. *Chapman* v. *El Paso Natural Gas Co.,* 192 F. 2nd 404. It was held that it is improper for the court to grant an injunction pending appeal from a decree denying the injunction in the absence of peculiar circumstances which so warrant. *Liberty National Bank of South Carolina* v. *McIntosh,* 16 F. 2nd 906. Certiorari dismissed. 273 U.S. 769.

The Court in *Green* v. *U.S.,* 356 U.S. 165, 2 L ed 2nd, 672, 681 was dealing with an order for the surrender of a defendant who had been convicted and his punishment fixed at a fine of $10,000.00 and five years imprisonment. We quote from that opinion.

> "In contrast to the judicial restrictions imposed on the contempt power exercisable under the clauses now found in subdivisions (1) and (2) of § 401, we find no case suggesting that sudivision (3) of § 401, before us here, is open to any but its obvious meaning. This clause also finds its statutory source in the Act of 1831, which first made explicit the authority of federal courts to punish for conduct of the kind involved in this case by providing that the contempt power should extend to '. . . disobedience or resistance . . . to any lawful writ, process, order, rule, decree, or command . . .' of a federal court."

The court held in *Terminal Railroad Association* v. *U.S.,* 266 U.S. 17, 29, 69 L ed 150, 155

> "In contempt proceedings for its enforcement a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read."

To the same effect see *Kelton* v. *U.S.* 294, Fed. 491, Certiorari denied, 264 U.S. 590, 68 L ed 864. See also *U.S.* v. *Hall,* 198 F 2nd 726. See *NLRB* v. *Express Publishing Co.,* 312 U.S. 426, 435, 85 L ed 930. See also *Traub* v. *U.S.,* 98 U.S. App. D.C. 43, 232 F 2nd 43, 47. See also *McFarland* v. *U.S.,* 295 F 648, 650. See also *NLRB* v. *Bell Gas & Oil Co.,* 98 F 2d 405, 406. See also *NLRB* v. *Bell Gas & Oil Co.,* 99 F 2d 56.

**WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY THE LAW**

The majority opinion of the 4th Circuit as Chief Judge Haynsworth so ably sets forth in his dissenting opinion is in conflict with prior decisions of the 4th Circuit. In *Ex parte Buskirk* 4th Cir. 72 F. 14, Buskirk had been guilty of contempt of an Order of the United States District Court of West Virginia. Buskirk was a defendant in an action of ejectment involving the title to real estate. Subsequently, a bill was filed alleging that the defendant, Buskirk, was preparing to cut and remove timber from the land in controversy in asking for an injunction. Subsequently, the complainant filed affidavits that Buskirk had violated a stipulation entered into in the cause and asked for a rule against him. Buskirk filed his answer stating (1) That no order had been entered in the case by way of injunction (2) That the so called stipulation was not in writing and

that no order with respect thereto existed (3) That the parties and their attorneys are in disagreement as to certain oral conversations between them and that in the absence of an order of the court Buskirk could not be adjudged in contempt. Thereafter the court undertook to enter an injunction against Buskirk nunc pro tunc. Subsequently an order was entered finding the defendant in contempt and imposing a fine against him and the defendant having refused to pay the fine and costs he was ordered to be committed to jail. The proceedings came to the 4th Circuit upon writ of habeas corpus. The court cited the provisions of the statutes then in effect limiting punishment for contempt to the conduct now defined and simplified under 18 U.S.C. §401 (1), (2), (3). The court cited *Ex parte Robinson, supra.* The court held that the nunc pro tunc order entered on June 28, 1895 was a complete nullity and void, that the defendant therefore did not act in violation of any lawful court order and should be discharged by writ of habeas corpus. The opinion of the Court of Appeals for the 4th Circuit is in complete conflict with the opinion in *Buskirk.* In fact at least in *Buskirk* there was an effort to make an order. In this case there was no semblance of an order and as heretofore pointed out at the time of the Board's act in paying tuition grants it was by no means certain that any adverse order or judgment would ever be made.

In *Atwell* v. *U.S.,* C.A. 4th Cir. (1908) 162 F. 97 the same statute was before that court under different facts. In this case a grand juror who sat in April 1905 and who had taken an oath of secrecy after he was discharged from grand jury service made a disclosure of occurrences during the deliberation of the grand jury. A rule was issued requiring Atwell's appearance to show cause why he should

not be punished for contempt in the disclosures. In reversing a conviction for contempt the Court of Appeals made the following statement:

> "While courts are vested by common law with inherent powers to protect themselves and enforce their mandates, there can be no question that this power may be limited by legislative authority, and it cannot be further questioned that this act of Congress has limited this power in federal courts to a greater extent than it has been limited by any other government where the common law prevails. While this is true, it must be conceded by all that this power cannot be absolutely destroyed without making the mandate of the courts mere idle and meaningless fulminations to be ridiculed and not respected. Mr. Justice Johnson, in Anderson v. Dunn, 6 Wheat. 204, 5 L. Ed. 242, while substantially deciding that the power to punish by contempt may be limited by legislation, has nevertheless very pertinently said:
>
> "The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger. No one is so visionary as to dispute the assertion that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences, if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state

as they arise. It is the science of experiment. But, if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interest and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbors' rights.'"

"The wisdom of these enunciations of sound morals and correct legal principles is accentuated with redoubled force under the conditions which exist to-day. The exercise of this discretion and power by the courts is not designed for evil, but for good; not for oppression, but for protection. Very frequently those who complain the loudest against its exercise are ultimately benefited the most. Men, inflamed by passion, are frequently not capable of rightly judging of their own conduct or of foreseeing the consequences thereof. In such cases the restraining power on the part of judges, acting under solemn obligations to do 'equal right to the poor and to the rich,' chastened and humbled by the sense of the weighty responsibilities laid upon them, may save such persons from liability to civil and criminal actions, calculated to bring to them ruin and loss of liberty. While these things are true, we, as judges, must never fail to remember the restraints which hedge about this discretion. The contempt proceedings must be regarded as in its nature of a criminal character, and the accused must be entitled to all reasonable doubt arising from the facts alleged to con-

stitute the contempt. He is guaranteed the right to appeal, and he may by the executive power be pardoned. This statute has been construed, and the limitations placed upon this power by it have been very clearly defined, by Mr. Justice Field in Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205, wherein he says:

"'The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and, consequently, to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited by Act Cong. March 2, 1831, c. 99, 4 Stat. 487. The act in terms applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt; but that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts expending or limiting their jurisdiction. The act of 1831, is, therefor, to them the law specifying the cases in which summary punishment for contempt may be inflicted. It limits the power of these courts in this respect to three classes of cases: (1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on

> the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.' "

So that it is apparent that the majority opinion in this case is in complete conflict with at least two prior 4th Circuit decisions. *Berry* v. *Midtown Service Corp.*, CA 2nd Cir. (1939) 104 Fnd 107 was an action to recover damages for wrongful death which resulted in a judgment for the plaintiff which was entered of record. After the verdict was rendered counsel for the insurance carrier who represented the defendant asked for a stay of execution to allow time to consider an appeal. After discussion between the court and counsel a 20 day stay was granted. During this period the judgment debtor disposed of all of its assets and the plaintiff obtained an order requiring the transferer and transferees and their several officers to show cause why they should not be fined for a civil contempt. The court in its opinion refers to *Lamb* v. *Cramer, supra* and *Merrimack River Savings Bank* v. *Clay Center, supra* and other cases holding that a removal of the subject matter or its destruction pending an appeal may constitute a contempt. It then said:

> "But decisions such as these do not control the case at bar, since the present action was not concerned with any specific property; nor would an appeal be defeated or impaired by the judgment debtor's transfer of its assets after rendition of the money judgment. Hence contempt, if contempt there be, must turn on the final clause of the statute."

The court notes the decision of Judge Van Fleet in *Lineker* v. *Dillon,* 275 F. 460, D.C. N.D. Cal. whose opinion was in conflict with the opinion of the court in the case before it.

"Despite our respect for the views of Judge Van Fleet, we are unable to agree with his opinion that a stay directed to one party can be expanded by implication into an order upon the other. The authorities he cites do not extend so far. Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby imposed upon him. Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it is a wiser policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule."

In another case decided in the 2nd Circuit *RE Probst,* 205 F 512 (1913) an involuntary petition in bankruptcy was filed against Probst. Probst obtained from the Bankruptcy Court an order staying prosecution of an action pending against him in a state court. In applying for the stay he represented that he was in possession of all of the assets listed in his bankruptcy schedule and was holding them subject to the orders of the court. During the period of the stay he disposed of the assets and used the proceeds for his personal needs. The creditors sought a judgment againt him in contempt. The District Court entered a contempt judgment which the Court of Appeals reversed holding that Probst's conduct was neither misbehavior in the presence of the court nor was he an officer of the court and since there was no writ, process, order, rule, decree, or command of the court which his conduct violated he should not be convicted of the contempt.

In addition to *Lineker* v. *Dillon, supra,* there are several cases in other circuits which appear to be in conflict with the decisions above cited. These are *Raymor Ballroom Co.*

v. *Buck*, CA 1st Cir. (1940) 110 F 2d 207. *Dakota Corp.* v. *Slope County, North Dakota*, CA 8th Cir. 75 F 2nd 584. *Land* v. *Dollar*, CA D.C. (1951) 190 F 2nd 366. See also *In RE Sixth & Wisconsin Tower, Defenhorst* v. *Aitkin*, CA 7th Cir. (1939) 108 F2nd 538.

To lend further confusion to the legal situation there are a line of cases where an injunction was denied in the lower court to restrain the defendant from disposing of property or consummating merger contracts or like actions. The plaintiff in these cases filed notice of appeal, but failed to procure an order preserving the status quo pending the appeal. In each instance the defendant did the act sought to be enjoined, that is, made a transfer of the stock or other property which was the subject matter of the suit. In none of these cases was a rule for contempt issued and all of them were dismissed on appeal by the Court of Appeals involved. See *Fink* v. *Continental Foundry & Machine Co.* CA 7th Cir. 234 F. 2nd 465 Transfer of stock by corporate defendant in consummation of a merger agreement pending appeal. Dismissed upon the ground that there was nothing the Court of Appeals could do to restore the status quo. *Kelaghan* v. *Industrial Trust Co.* CA 1st Cir. (1954) 211 F. 2nd 134 Suit by stockholder to enjoin a corporation and its directors from carrying out the terms of proposed plan of consolidation with another banking corporation. Notice of Appeal was filed by plaintiff but no order to preserve the status quo pending the appeal. Appeal dismissed as moot. *Brill* v. *General Industrial Enterprises* (1956) CA 3rd Cir. 234 F. 2nd 465. Stockholders derivative suit to enjoin sale of the corporation's assets upon the ground that the sale would violate the antitrust laws. Notice of appeal given, transfer was consummated and suit was dismissed. In this case the court said:

"It is well-settled that the mere filing of an appeal in the absence of a stay of proceedings, cannot operate as an injunction where none has been granted by the court below; otherwise stated, an appeal from a decree dismissing a complaint seeking an injunction, or refusing to grant an injunction, will not disturb the operative effect of such a decree, and where the act sought to be restrained has been performed, the appellate courts will deny review on the ground of mootness. Mills v. Green, 1895, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293; Jones v. Montague, 1904, 194 U.S. 147, 24 S.Ct. 611, 48 L.Ed 913; Selden v. Montague, 1904, 194 U.S. 153, 24 S.Ct. 613, 48 L.Ed. 915; Richardson v. McChesney, 1910, 218 U.S. 487, 31 S.Ct. 43, 54 L.Ed. 1121; Shaw v. Lane, 1917, 47 App. D.C. 170, 173, appeal dismissed sub nom. Shaw v. Payne, 1920, 254 U.S. 609, 41 S.Ct. 60, 65, L.Ed. 436; Chesapeake Western Ry. v. Jardine, 1925, 56 App. D.C. 33, 8 F. 2d 194, certiorari denied sub nom. Town of Bridgewater v. Jardine, 1926, 270 U.S. 653, 46 S.Ct. 352, 70 L.Ed. 782; California Canning Peach Growers v. Myers, 9 Cir., 1935, 78 F. 2d 194, 195."

"What was said in *Shaw* v. *Lane, supra* is particularly appropriate. There an appeal was dismissed where it sought to review the District Court's dismissal of a bill for an injunction to restrain the Secretary of the Interior from approving and delivering certain mineral leases of property belonging to an Indian tribe, it appearing that pending the appeal the leases had in fact been approved and delivered.

"Said the Court, 47 App. D.C. at pages 173-174:

" 'This is a clear case, where appellants applied to the court for a restraining order, which was denied, and no stay of proceedings was had pending appeal. The rule is without exception that, where appeal is taken from a decree dismissing a bill for injunction, and pending appeal the act sought to be restrained is done, the appeal will not operate as a stay of proceedings.

> The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect. Hovey v. McDonald, 109 U.S. 150, 161, 3 S.Ct. 136, 27 L.Ed. 888; In re Slaughterhouse Cases, 10 Wall. 273, 297, 19 L.Ed. 915; Leonard v. Ozark Land Co., 115 U.S. 465, 468, 6 S.Ct. 127, 29 L.Ed. 445. When an injunction has been dissolved, it cannot be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. A fortiori, the mere prosecution of an appeal cannot operate as an injunction where none has been granted. Knox County v. Harshman, 132 U.S. 14, 10 S.Ct. 8, 33 L.Ed. 249.'"

These decisions especially those decisions of this court cited in the quotation from *Brill* v. *General Industrial Enterprises* are in conflict with the majority opinion of the lower court and appear to be in conflict with the opinion of this court in *Lamb* v. *Cramer, supra,* and possibly *Merrimack Savings Bank* v. *Clay Center, supra.* These last two cases may be distinguished from the present case as suggested in the dissenting opinion of Chief Judge Haynsworth but this does not remove the conflict with the line of cases immediately referred to.

The lower court emphasized the language contained in the opinion in *Merrimack Savings Bank* v. *Clay Center*

> "This we need not decide, *since irrespective of any such injunction actually issued the willful removal beyond reach of the court of appeal . . . is, in and of itself, a contempt of this court . . .*" (Emphasis that of the Court of Appeals)

Incidentally the *Merrimack* case involved the destruction of utility poles and wires which action was sought to be enjoined. It is apparent that the destruction involved did

actually put it beyond the power of the court to grant an effecive injunction against such destruction. The same is true of *Lamb* v. *Cramer* which involved a suit to set aside a fraudulent conveyance, the property having been transferred beyond the reach of the court pending appeal. The present case is not a suit to reach or to deal with specific *property* but rather a suit to have adjudicated the *right* of the Board to expend public revenue as required and permitted by the law in Virginia. The payment of the tuition grants did not impair the power or jurisdiction of the court to decide the issue and to issue its injunction which in fact became effective to restrain future action. So that, tested by the standard laid down in *Merrimack* and *Lamb* the subject matter of the present suit was not specific property but rather to adjudicate the legal right of the Board to expend money. The court's jurisdiction on appeal was not defeated for the injunction sought was actually granted.

**PRIOR HISTORY OF THE EFFORTS OF THE PLAINTIFFS TO PROCURE AN INJUNCTION AGAINST ALL TUITION GRANTS IN PRINCE EDWARD COUNTY**

The injunction directed by the Court of Appeals 339 F. 2nd 486, 493 was:

> "Enjoining the defendants from processing or paying tuition grants to parents desiring to send their children to the foundation schools as long as those schools remain segregated, or to any other segregated school that is, in effect, an extension of the public school system."

The same injunction was sought by the plaintiffs in the district court when their amended supplemental complaint was filed. It was denied in the district court and instead

the court enjoined the payment of tuition grants "so long as the public school remained closed." 207 F. Supp. 349. On appeal to the 4th Circuit the refusal of the district court to grant the broader injunction was assigned as error. The Court of Appeals refused any injunction and held that the district court should have abstained from deciding the issues pending interpretation of state law. *Griffin* v. *State Board of Education,* 322 Fed. 2nd 332 C.A. 4th Circuit 1963. This court granted certiorari and its opinion is reported. 377 U.S. 218, S.Ct. 1226, 12 L.Ed 2d 256. Error was assigned in this court for failure of the district court to grant the broad injunction. Both the appellants and the appellees briefed the question on that appeal. The Solicitor General of the United States expressed the view that the court should not grant this broad injunction. This court affirmed the judgment of the district court and remanded the case for the entry of an order enjoining the payment of tuition grants "so long as the public schools remain closed" and requiring the Board and its individual members to levy taxes to raise funds adequate to operate the public school system in Prince Edward County like that operated in other counties in Virginia. The District Judge entered an order exactly in accord with the mandate of this court. The case was in this posture when the plaintiffs filed their motion to amend and alter the order and subsequently their motion for further relief asking for the broad injunction which this court had in effect refused to issue. The district judge believing that such an injunction should be the subject of a different suit refused to grant the injunction. The Court of Appeals reversed and the injunction was awarded and entered. (Other counties and cities in Virginia are controlled by a different injunction. See *Griffin* v. *State Board of Education,* 239 F. Supp. 560, 566)

This history of this litigation is recited here because it supports the good faith of the Board of Supervisors. Its action was consistent with its lawful rights. Certainly in the light of this long history of refusal of the injunction sought, in the light of the requirements of Rule 62 (c) for the issuance of an injunction or other order to maintain the status quo and in the light of the simple and we submit controlling provisions, 18 U.S.C. § 401 (3), there is absolutely no legal basis upon which to support the jurisdictional power or authority of the Court of Appeals in its judgment of contempt against the Board and its individual members.

## CONCLUSION

It makes no difference what one may think of the propriety, the appropriateness or even the morality of the actions taken by the Board. These considerations are wholly irrelevant unless the law authorizes the judgment rendered.

It is essential that this awesome power of the court be defined and the legal confusion which is apparent from the conflicting decisions of the lower courts, some of which are in conflict with the express decisions of this court, should be clarified and resolved. This cannot be done save by the granting of the writ here prayed.

Respectfully submitted,

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Blackstone, Virginia
*Special Counsel*

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*Commonwealth Attorney*
*of Prince Edward County*

**CERTIFICATE**

I, J. Segar Gravatt, a member of the bar of the Supreme Court of the United States and counsel for the Board of Supervisors of Prince Edward County, Virginia, and its individual members in the above captioned matter being a Citation for Contempt upon Motion of Cocheyse J. Griffin, et als., etc., against said Board and its individual members do hereby certify that copies of the Petition for Certiorari and Appendix have been served upon counsel of record for the adverse parties and upon counsel representing all other parties in the Court below by depositing the same in the United States Post Office, with first class postage prepaid, this 17th day of September 1966, pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States as follows: S. W. Tucker, Esq. and Henry L. Marsh, III, Esq., 214 East Clay Street, Richmond, Virginia 23219, Attorneys for the adverse parties and the following attorneys for other parties in the Court below: John F. Kay, Esq., 1200 Ross Building, Richmond, Virginia, Robert Y. Button, Attorney General of Virginia, State Library Building, Richmond, Virginia, R. D. McIlwaine, III, Esq., Assistant Attorney General of Virginia, C. F. Hicks, Esq., Gloucester, Virginia, Frederick T. Gray, Esq., State-Planters Bank Building, Richmond, Virginia.

Given this 17th day of September 1966.

J. SEGAR GRAVATT

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IN THE

# Supreme Court of the United States

**October Term, 1966**

No. 562

The Board of Supervisors of Prince Edward County, Virginia, and its ~~contingent~~ constituent members, namely, W. W. Vaughan, C. W. Gates, H. M. Jenkins, Charles B. Pickett, John C. Steck and H. E. Carwile, Jr., personally and in their own right,

*Petitioners,*

v.

Cocheyse J. Griffin, Migon D. Griffin, Naja D. Griffin and L. Francis Griffin, Jr., infants, by and through L. Francis Griffin, their father and next friend, and all other of the plaintiffs,

*Respondents.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## I

### Majority Opinion of the United States Court of Appeals for the Fourth Circuit, dated June 20, 1966

ALBERT V. BRYAN, *Circuit Judge:*

A judgment of civil contempt upon the Board of Supervisors of Prince Edward County and its members is moved for by the appellants-plaintiffs. The ground of the motion is that the Board disbursed public funds to private segregated schools while the right to do so was under consideration by this court. A remedial order requiring the Board to restore these moneys to the County Treasurer is also asked. We grant the motion.

The episode developed in the enforcement of decrees of the District Court reopening the Prince Edward County public schools. The history of the litigation is laid out, ab ovo usque ad mala, in *Griffin* v. *County School Board,* 377 U.S. 218, 224 (1964). There the facts of the present controversy are related, commencing with the District Court's injunction dated November 16, 1961. This injunction was issued on the supplemental complaint of the Negro children and parents who were plaintiffs in the District Court and are the appellants here.

Specifically, the injunction commanded the Board and the State not to pay out further funds in tuition grants while the public schools of Prince Edward County remained closed. *Allen* v. *County School Board,* 198 F. Supp. 497, 503-504 (E.D. Va. August 25, 1961). The grants had been used for the support of Prince Edward County Educational Foundation, a privately organized corporation conducting a school for white children only. The Court refrained at the time from passing on the County's right to refuse to operate its public schools until the question could be ruled on by the State courts.